law. This is done by the act of 1839, if it be what it is now construed to be. In this aspect, then, I say, the act is unconstitutional and void. It not only strikes down the rights of the citizen, but it inflicts a blow on the judicial power of the country. It unites, in the same department, the executive and judicial power. And on a subject the most delicate and interesting; and one which, of all others, may most easily be converted into an engine of oppression.

In this government, balances and checks have been carefully adjusted, with a view to secure public and private rights; and any departure from this organization endangers all. We have less to apprehend from a bold and open usurpation by one department of the government, of powers which belong to another, than by a more gradual and insidious course. In my judgment, no principle can be more dangerous than the one mentioned in this case. It covers from legal responsibility executive officers. In the performance of their ministerial duties, however they may disregard and trample upon the rights of the citizen, he can claim no indemnity by an action at law. This doctrine has no standing in England. No ministerial officer in that country is sheltered from legal responsibility. Shall we in this country be less jealous of private rights and of the exercise of power? Is it not our boast that the law is paramount, and that all are subject to it, from the highest officer of the country to its humblest citizen? But can this be the case if any or every executive officer is clothed with the immunities of the sovereignty? If he cannot be sued, what may he not do with impunity. I am sure that my brethren are as sincere as I am, in their convictions of what the law is, in this case; and I have only to regret, that their views do not coincide with those I have stated.

ROBERT WHITE, PLAINTIFF IN ERROR, *v.* WILLIAM S. NICHOLLS, WILLIAM ROBINSON, OTHO M. LINTHICUM, EDWARD M. LINTHICUM, RAPHAEL SEMMES, PAUL STEVENS, AND CHARLES C. FULTON, DEFENDANTS IN ERROR.

ROBERT WHITE, PLAINTIFF IN ERROR, *v.* HENRY ADDISON, DEFENDANT IN ERROR.

In an action for a libel it is not indispensable to use the word "maliciously" in the declaration. It is sufficient if words of equivalent power or import are used.

Every publication, either by writing, printing, or pictures, which charges upon, or imputes to, any person that which renders him liable to punishment, or which is calculated to make him infamous, or odious, or ridiculous, is *prima facie* a libel, and implies malice in the author and publisher towards the person concerning whom such publication is made.

Proof of malice cannot, in these cases, be required of the party complaining,

beyond the proof of the publication itself; justification, excuse, or extenuation, if either can be shown, must proceed from the defendant.

Privileged communications are an exception; and the rule of evidence, as to such cases, is so far changed as to require of the plaintiff to bring home to the defendant the existence of malice as the true motive of his conduct.

Privileged communications are of four kinds:

1. Wherever the author and publisher of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests.
2. Any thing said or written by a master in giving the character of a servant who has been in his employment.
3. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used.
4. Publications duly made in the ordinary mode of Parliamentary proceedings, as a petition printed and delivered to the members of a committee appointed by the House of Commons to hear and examine grievances.

But in these cases the only effect of the change of the rule is to remove the usual presumption of malice. It then becomes incumbent on the party complaining to show malice, either by the construction of the spoken or written matter, or by facts and circumstances connected with that matter, or with the situation of the parties, adequate to authorize the conclusion.

Proof of express malice, so given, will render the publication, petition, or proceeding, libellous. Falsehood and the absence of probable cause will amount to proof of malice.

The jury being the tribunal to determine whether this malice did or did not mark the publication, the alleged libel should be submitted to them, and the court below erred in withholding it.

THESE two cases depended upon the same facts and principles, and were argued together. They were brought up by writ of error from the Circuit Court of the United States for the District of Columbia, sitting for the county of Washington.

The facts were these:

On the 26th of June, 1841, the following letter was addressed to the President of the United States:

"*Georgetown, June 26th*, 1841.

"SIR:—We feel it to be proper to put you in possession of the grounds upon which the removal of Mr. Robert White, from the office of collector of customs of this port, is requested. You will recollect the humiliating and prostrate condition of the people of this district about a year ago, when the majority then in Congress determined to destroy our banks as a punishment upon us for having avowed and published our preference for the candidates of the great whig party. It was in that dark season that Mr. White determined to desert his own fellow-citizens, and to join in the war which was making upon their liberties and interests. Being then seeking office, he thought to recommend himself to the executive by getting up a memorial here, which was to be used as a sanction or approval, on the part of our own citizens, of the mad policy which had been adopted by their oppressors. He then joined with an assemblage of forty-eight persons in getting up a memorial, which none but themselves could be induced to sign. These memorialists, with about five exceptions, could not be identified by name or residence,

as citizens of Georgetown. Upon investigation, they proved to be apprentices and journeymen, holding a transient residence in the town. Being few in number, they were no doubt believed by Congress, and persons at a distance, to be a select body of experienced merchants and traders, who had some knowledge of the subject of their memorial. A copy of the memorial has been deposited with the secretary of the Treasury.

"It is, perhaps, one of the vilest calumnies ever issued by a band of thoughtless and irresponsible individuals, many of whom would have shrunk from such a proceeding had they the necessary intelligence to comprehend its enormity. But not so with Mr. White. He knew the paper contained an unmitigated slander. He seemed to be willing to blacken the character of those of his fellow-citizens who had been intrusted with the charge of our banks, if that would only secure an appointment when all other methods had failed him for the preceding twelve years.

"We revolt at the idea of Mr. White being permitted to remain in an office whose emoluments flow from the labour and enterprise of the very men whose business and families he sought to involve in ruin.

"It is impossible that he can ever regain the confidence of men whom he abandoned and vilified in the darkest hour of their existence. His expulsion from office is no less demanded by his unpardonable conduct, than by justice to the wounded feelings of an injured community.

"About the same time, June, 1840, with the persons under his influence, and as is believed at the request of an office-holder of great political rancor, Mr. White procured Dr. Duncan, then a member of Congress from Ohio, to deliver a speech here in abuse of General Harrison. The speech was, perhaps, the very vilest that was ever delivered by that gentleman.

"It was so satisfactory to Mr. White, who acted as vice-president on the occasion, that he immediately rose, and moved the doctor a vote of thanks, and a request that the speech be furnished for publication. The resolutions which were adopted unanimously on the occasion, were nearly as calumnious as the speech itself.

"We refer you to the Globe newspaper of the 3d July last, for an official account of the proceedings of the meeting. We will only trouble you with a few sentences, that you may have some idea of the character of those extraordinary proceedings. They denounced General Harrison as 'the nominee of the bank whig federalist, abolitionist and anti-masons,' 'an abolitionist of fraud and concealment,' as being guilty of pursuing a course 'grossly insulting to common sense, honesty, and decency, by shrouding himself in darkness,' 'of courting dangerous fanatics, and countenancing them (abolitionists) in their mad warfare upon our peace, our pro-

perty, and our lives,' and 'that he should be treated as an abolitionist.'

"Mr. White's was the place where the leading men of his party nightly assembled up to the close of the presidential election, and a respectable citizen declares, that since Mr. White's appointment he circulated 'bushels' of the 'Globe.' He declines to give his formal evidence in the case, upon the ground, that he being a near neighbour of Mr. W., he is unwilling to disturb the friendly personal relations existing between them.

"Such was Mr. White's general political violence, and the unhesitancy with which he descended to the lowest means to secure the favour of the late administration, that no one doubted here but that he would be dismissed when the present party came into power, and no one can be more astonished than Mr. White is himself at his retention to the present time.

"We will also take this opportunity to state, that we desire Mr. H. Addison to be appointed to the office of collector in Mr. White's place, whose abundant testimonials and recommendations of our business citizens are already on file with the secretary of the Treasury.

"With great respect, your obedient servants,

CHAS. C. FULTON,
E. M. LINTHICUM,
RAP. SEMMES,
O. M. LINTHICUM,
WM. ROBINSON,
WM. S. NICHOLLS,
PAUL STEVENS.

"P. S. It is further proper to state, that Mr. Addison's recommendations, filed with Mr. Ewing, are signed by every citizen in town, with a single exception, who have regular business to transact at the custom-house."

On some other day, which was not stated in the record, the following letter was addressed to the secretary of the Treasury.

"Hon. THOMAS EWING,
Secretary of the Treasury.

"SIR.—Earnestly requesting, as we now do, the immediate removal of Mr. Robt. White from the office of collector of this port, we feel it proper to state candidly our insuperable objections to his continuance in that office.

"At a time when a remorseless and vindictive majority in Congress were making a ruinous war upon all the business interests of the country, by destroying confidence in its banking institutions, and when that majority were pursuing a most persecuting and ruinous course towards the defenceless and unoffending people of this District, Mr. White, for the mere purpose of evidencing his unscrupu-

lous zeal in behalf of the late administration, and to secure its favour, did, under the most offensive circumstances, sign a violently abusive and insulting memorial to Congress, urging in the most decided manner the adoption of fatal measures toward the banks, by compelling them to continue specie payments, when all the institutions of Virginia and Maryland had suspended, and thereby to be compelled to pursue a destructive and burdensome policy towards their customers.

"The object of the memorial was to place something in the hands of our enemies, in the shape of an approval of their course, which was a gross deception.

"This offence becomes greatly aggravated, when it is known that Mr. White knew, so far as his acquaintance went with his co-signers, that they were too grossly ignorant of business and banking to be able to express any opinion upon such a subject. The other signers, with the exception of two or three, were so wholly unknown to our business community, that Mr. White would not be able to identify their persons or designate their residences. It is to be taken for granted that they were merely transient labourers, or persons so young as not then to have attracted the notice of our oldest and most observing citizens; some of them, indeed, were known to be small apprentices. So offensive and unpopular was the whole proceeding, that with the exception of, perhaps, two others, (from whom our community would look for nothing better,) Mr. White was the only respectable man of business who could be induced to put his name upon the paper. His own purpose could never have been detected, but for his appointment as collector, which so soon succeeded. Mr. White's experience in trade had taught him the indispensable necessity there was for banks in this District, and his intelligence and sense of justice were outraged by the declaration that our banks should be made to pay specie, when the banks of our neighbouring states of Virginia and Maryland found it wholly impracticable so to do. He knew the gentlemen who had the management of our banks, directors as well as officers, and he knew they stood without reproach, and that it was wholly impossible that they could be influenced by the low and disreputable designs which his memorial so unscrupulously charged to them. It was a vile slander, put forth so as to evade the responsibility of a legal prosecution. We think he is the last man to hold an office, the value of which depends upon the enterprise and integrity of the very men whose families and business were alike to be overwhelmed with ruin at his special application.

"His removal from an office thus obtained would be doubly gratifying to us, when we know his family does not need its emoluments for support.

"It can be proved that at his store, in which the office of collector is kept, there were almost nightly assemblages of the principal party men who sustained the late administration, and particularly during the fall of 1840.

"A highly respectable man has stated that, during the latter part of the late canvass, he saw Mr. White preparing immense numbers of the newspaper called the 'Washington Globe,' for circulation, but, being a neighbour of Mr. White, he is unwilling to appear as a witness against him. The language the gentleman used was, that 'he had seen bushels of the Globe so prepared, since his appointment as collector.'

"Under these circumstances, we would most respectfully ask you to dismiss Mr. White from the office, and that our fellow-townsman, Mr. Henry Addison, who has already been recommended by most of us, may be appointed to fill it.

O. M. Linthicum,	Wm. Hayman,
Raphael Semmes,	Jos. Smoot,
Wm. Robinson,	Wm. S. Nicholls,
E. M. Linthicum,	James Thomas,
Peregrine Warfield,	Jeremiah Orme,
Robert Ould,	T. P. Waugh,
Wm. Jewell,	Edw. S. Wright,
William Laird,	J. Riley,
Wm. Lang,	W. S. Ringgold,
S. E. Scott,	J. I. Stull."

On the 19th of June, 1841, the following letter was addressed to the secretary of the Treasury.

"*Georgetown, June* 19, 1841.

"Sir:—About a year ago, the Hon. A. Duncan, of Ohio, was invited, by a number of office-holders and others, to hold a political meeting in this town.

"The meeting was held on the 26th June, 1840, and the proceedings were published in the Globe, on or about the 3d July.

"Mr. Robert White, our collector of customs, acted as one of the vice-presidents of the meeting, and who was so tickled and delighted with Duncan's vile calumnies upon Gen. Harrison, that he arose and made the motion that he (Duncan) would prepare the speech for publication. The address was said to be one of the vilest, and, if you desire it, a copy shall be presented for your perusal. The persons who moved the resolutions, and one of the secretaries, were clerks in the departments.

"We now hand you a copy of two of the resolutions, and an account of the proceedings, which we present separate, for your immediate and convenient notice, referring you at the same time to the very lengthy account to be found in the Globe of the date mentioned above.

"You will see that the copy now sent applies the following language to General Harrison: 'Nominee of the bank whigs, federalists, abolitionists, and anti-masons.' 'Fraud and concealment'—'grossly insulting common sense, decency, and honesty, by shrouding himself in darkness'—'of courting dangerous fanatics, and

countenancing them in their mad warfare upon our peace, property, and lives.' 'He should be treated as an abolitionist.'

"This conduct of Mr. White, in connection with his signature being placed to the infamous anti-bank memorial, which a delegation from town left in your hands when Mr. White's removal was first requested, renders him extremely offensive to the whigs here. We again would take the opportunity to remind you of our earnest hope that Mr. H. Addison will be appointed to that office, whose full and abundant testimonials are already in your possession.

"The continuance of Mr. White is mortifying to every real friend of the administration here.

"With respect, your obedient servants,

O. M. LINTHICUM,
WILLIAM LAIRD,
WM. S. NICHOLLS.

"HON. T. EWING,
Secretary of the Treasury."

On the 21st of September, 1841, the following letter was addressed to the President.

"*Georgetown, Sept.* 21, 1841.

"SIR:—Should any paper be sent to you, contradicting in any manner a representation made by ourselves to the conduct of Mr. White, late collector of this port, we will thank you to let us have a copy of that paper, with the names appended thereto, that we may see in what particular, and to what extent, our statement may have been contradicted, and by whom.

"With great regard, we are, sir, your obedient servant,

O. M. LINTHICUM,
W. ROBINSON,
WILLIAM LAIRD,
RAPH. SEMMES,
WM. S. NICHOLLS,
D. ENGLISH, Jun.

"To His Excellency, JOHN TYLER, President U. S."

And upon the 23d of September, 1841, the following:

"*Georgetown, September* 23, 1841.

"SIR:—I feel bound to make to you this statement, in consequence of a report which has reached my ears, that Mr. Robert White, with Captain Carbery, and B. Mackall, are endeavouring, by their joint influence and representations, to injure me in your estimation. It is due no less to you, than to my friends and myself, to write you this letter, in which I shall omit every thing that is not really necessary to be stated.

"As to Mr. White, I feel warranted in assuring you that the representations made to you by my friends in regard to him, are true throughout, of which fact they will be able to furnish you the

abundant evidence. No man of character here would hazard the intimation that these friends of mine would possibly descend to a misrepresentation in regard to Mr. White or any one else.

"For all they have stated they can produce a mass of evidence too strong to be doubted.

"In relation to Mr. Carbery, I have only to refer you to my letter to you of the 23d August, and its accompanying papers. I would take much pleasure in furnishing you with any further explanations in regard to that case that you might desire.

"It is wholly impossible that Mr. Mackall can have the least ground for complaint, as I can supply you with abundant proof that there was no employment here for him whatever, nor any prospect of need of his services at any time hereafter. All the labour performed by him, since I have been appointed to this office, was merely to sign a receipt for his pay. He, or his friends for him, appealed to the secretary of the Treasury, and seemed to have succeeded in producing an impression on his mind that I was meditating an unjust proceeding towards Mr. Mackall—all this, too, before I had said or written a word to Mr. Ewing upon the subject. He wrote me that Mr. Mackall must not be removed until I assigned him my reasons for so doing. I obeyed his order; but, on the very day I wrote him that there were no service for Mr. Mackall to perform, Mr. Ewing instructed me to discontinue the office. Mr. Mackall still complained to the secretary, who wrote me to come to the Treasury Department. I went, and after hearing my statement, he said he was then satisfied that he had done what was proper in the case. I did not feel at all hurt at the course taken by Mr. Ewing, because I knew that the whole matter had been grossly misrepresented to him. I had been waited upon by a friend, who earnestly remonstrated with me upon the subject of abolishing Mr. Mackall's office; as he said that, in that case, the influence of a powerful family connection would be immediately wielded against me. I did not exactly see the propriety of being governed by such apprehensions, and took the course prompted by my sense of duty, and relying confidently upon the favourable result of an impartial investigation, should any difficulty occur.

"There is but little revenue collected at this port, and I felt it to be my duty to conduct its business with as little expense as possible. I found the expense of this office, as far as Georgetown is concerned, to be - - - - - - - - $2,573 34

"I have reduced these expenses to the sum of - 1,045 00

"Thus saving to the government - - - $1,428 34

without at all impairing the efficiency of the service. The whole expense of the office for Georgetown is now absolutely $45 a year less than Mr. Mackall was receiving for doing nothing. The expenses in Washington I have reduced twenty-five per cent. I did

this from a sense of duty, but not without anticipating much misrepresentation and abuse.

"I am, sir, with great regard, your obedient servant,

"To the PRESIDENT." "H. ADDISON.

On the 18th of November, 1841, Robert White brought the two suits mentioned in the titling of this statement.

The declaration in the suit against Nicholls and others contained two counts.

The first was as follows: "And whereupon the said plaintiff, by Brent & Brent and Francis S. Key, his attorneys, complains, for that whereas previous to, and at the time of committing of the several grievances by the defendants as hereinafter mentioned, the plaintiff was collector of the customs for the district, and inspector of the revenue for the port of Georgetown in the District of Columbia; yet the defendants well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving, and wickedly and maliciously intending to injure the plaintiff in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbours, and other good and worthy citizens of the county aforesaid, and to cause the plaintiff to be removed from his said office, heretofore, to wit: on the 20th June, 1841, at Georgetown, to wit, at the county aforesaid, falsely, wickedly, and maliciously did compose and publish, and caused to be composed and published, of and concerning the plaintiff, and of and concerning his aforesaid office, and of and concerning the plaintiff's conduct in his said office, for the purpose of procuring his removal from said office, a certain false, malicious, and defamatory libel, containing, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter of and concerning the plaintiff, and of and concerning his aforesaid office, and of and concerning his said plaintiff's conduct in his said office, for the purpose of procuring the removal of the plaintiff from his said office, as follows, that is to say: (then followed a copy of the letter to the President of June 26, 1841, down to the words "delivered by that gentleman," with the necessary innuendoes.)

The second count was as follows: "And whereas also the said defendants, intending and contriving to cause the plaintiff to be removed from the office then held by him, as stated in the first count heretofore, to wit, on the 26th June, 1841, at Georgetown, to wit, at the county aforesaid, falsely, wickedly, and maliciously, did compose and publish, and caused to be composed and published, of and concerning the plaintiff, and of and concerning his office, and of and concerning his conduct in his said office, and for the purpose of procuring his removal from his said office, a certain other false, malicious, and defamatory libel, containing, amongst other things, the following false, scandalous, malicious, defamatory, and libellous

matter of and concerning the plaintiff, and of and concerning his said office, and of and concerning his, said plaintiff's, conduct in his said office, and for the purpose of procuring the plaintiff's removal from his said office, that is to say:

"Mr. White's was the place, &c.," (then followed the remainder of the letter not included in the first count.)

The declaration concluded as follows:

"By reason of publishing of which said several libels, the said plaintiff saith, that he hath been and is greatly injured in his good name, fame, and credit, with and amongst all his neighbours, friends, and acquaintance. And by reason of the publishing of which said several libels, the plaintiff saith that he was heretofore, to wit, on the 12th day of July, 1841, at the county aforesaid, removed from his office aforesaid, and was thereby deprived of the emoluments and income of said office, amounting to a large sum of money, to wit, the sum of three thousand dollars annually, and hath been otherwise greatly injured, whereby the said plaintiff saith that he hath damage, and is the worse, to the value of twenty-five thousand dollars; and therefore he brings suit, and so forth.

"BRENT & BRENT, *for plaintiff.*"

The declaration in the suit against Addison also contained two counts, with no essential variation from the above.

The defendants pleaded not guilty, and in November, 1842, the causes came on for trial. They were tried together, the same evidence and instructions prayed from the court being common to both. The jury, under the direction of the court, found a verdict of "not guilty," and the following bills of exceptions show the points of law which were raised and ruled.

Plaintiff's 1st Bill of Exceptions.

"In the trial of these causes, the plaintiff, to support the issues on his part, offered evidence to show that he was duly appointed to the office set forth and described in the declaration, on the 21st day of July, 1840; and that he was acting as such officer from that time till the 9th day of July, 1841, when he was removed from office, and the defendant, Henry Addison, appointed in his place; and then further offered in evidence a written paper, (viz., the letter to the President,) and proved that the same was in the handwriting of the defendant Addison, and that the signatures thereto were in the handwriting, respectively, of the several defendants; that the said paper so written and subscribed was sent to the President of the United States, and by him sent to the Treasury Department, where it was filed on or before the 30th June, 1841, and kept by a clerk of that Department having charge of such papers, and shown on one occasion to one person by him—which person had called to see it at the request of the plaintiff; and also on another occasion to another person.

"And the plaintiff further offered evidence that one of the said defendants, whom he named, said, about the time of signing the said paper, and before the plaintiff was turned out of office, that the plaintiff had signed a memorial against the banks in the District, and swore that he would have him turned out of office.

"And also offered evidence that another of said defendants, also named, had on one occasion said, after the said paper had been sent to the President, that he had made no charges against the plaintiff; and on another occasion he stated he had made charges, and that he could prove against the plaintiff more than he had so charged.

"And the plaintiff further proved that the said paper, so written and subscribed, was shown to a citizen of Georgetown for the purpose of being subscribed by him, who refused so to do, because he was not acquainted with all the facts stated in said paper.

"And the plaintiff, upon the evidence aforesaid, offered thereupon to read the said paper to the jury; but the court refused to allow the said paper to be read in evidence to the jury.

"To which refusal of the court the plaintiff excepts, and prays the court to sign and seal this bill of exceptions, which is done accordingly, this 3d day of January, 1843.

"B. THRUSTON, [SEAL.]
"JAS. S. MORSELL. [SEAL.]"

Plaintiff's 2d Bill of Exceptions.

"And the plaintiff further offered, after the evidence aforesaid in former exceptions had been given, to show the malice of defendants in writing, signing, and presenting said paper, to read the said paper, and offered evidence in connection therewith of the falsehood of the charge therein stated, which the court also refused, and the plaintiff excepts to said refusal, and prays the court to sign and seal this bill of exceptions, which is done accordingly, this 3d January, 1843.

"B. THRUSTON, [SEAL.]
"JAS. S. MORSELL. [SEAL.]"

Plaintiff's 3d Bill of Exceptions.

"And the plaintiff, after the evidence was offered, as stated in the first and second bills of exceptions, and after the opinion had been given by the court, as therein stated, then offered to prove by substantial evidence, for the purpose of showing malice in the defendants in writing, signing, and presenting the said paper, that the charge contained in the said paper, of the plaintiff's having lost the confidence of the men from whose labours and enterprise the emoluments of his office flowed, was false, malicious, and without probable cause; that all the persons doing business with the said plaintiff, as such officer in his said office, during all the time of his continuing in office, were General Walter Smith, Henry McPherson, John Hopkins, and Jabez Travers—all which persons the plaintiff

now offers as witnesses to prove that the plaintiff had never lost their confidence, but that they always continued their confidence in the plaintiff, and approved of his conduct as such officer. And also, further to falsify the said charge, the plaintiff offers to prove that an election was held in Georgetown, in February, 1841 and 1842, for a common councilman in said town, in which election a majority of the qualified voters of said town voted for the plaintiff; and he was elected to the common council, notwithstanding the active opposition of several of the defendants.

"And the plaintiff, also, further offered to prove that the charges in the said paper of the plaintiff's having descended to the lowest means to secure the favour of the late administration; and that he procured Doctor Duncan to deliver a speech in Georgetown in the abuse of General Harrison; and that the plaintiff's was the place where the leading members of his party nightly assembled up to the close of the presidential election; and that the plaintiff, since his appointment to his said office, had distributed bushels of the Globe, were false, malicious, and without probable cause, by producing witnesses to falsify and disprove the said charges, and show that there was no foundation or probable cause for said charges.

"But the court was of opinion that such evidence was inadmissible, and refused to allow the same to be given in evidence to the jury; to which refusal the plaintiff, by his counsel, excepts, and prays the court to sign and seal this bill of exceptions, which is done accordingly, this 3d of January, 1843.

"W. CRANCH, [SEAL.]
"JAS. S. MORSELL. [SEAL.]"

Plaintiff's 4th Bill of Exceptions.

"In the further trial of this cause, and after offering the evidence stated in the preceding bills of exceptions, and after the opinions and decisions of the court as therein stated, the plaintiff, by his counsel, in order to show express malice, and the want of all probable cause in the defendants, in writing, and subscribing, and presenting, as before stated, the paper—writing set out in the declaration—and that the same was so written, subscribed, and presented by such defendants, not for the purpose of claiming redress for a grievance in the conduct of a public officer, but maliciously, and from private pique and resentment, and in order that the said paper, with the evidence now to be offered, should go to the jury as evidence of malice on the part of the defendants by competent evidence, and the want of probable cause for the charges contained in said paper, and in connection with such evidence to offer the said paper in evidence to the jury.

"And the defendants, by their council, objected to said evidence; and thereupon, the court refused to allow the same to be given for the purpose above stated, or for any other purpose; to which the plaintiff,

by his counsel, excepts, and prays the court to sign and seal this bill of exceptions, which is done accordingly, this 5th day of January, 1843.

"Witness our hands and seals, this 5th day of January, 1843.

"B. THRUSTON, [SEAL.]
"JAS. S. MORSELL. [SEAL.]"

Plaintiff's 5th Bill of Exceptions.

"In the further trial of this cause, and after the evidence stated in the preceding bills of exceptions had been offered as stated, and after the opinions and rejections of evidence as herein stated, the plaintiff in support of the issues joined on his part, for the purpose of proving a publication of the libel charged in the declaration on the part of certain of defendants, whose names are signed to the papers, now offered in evidence the following papers, (the several handwritings of the said defendants signing the same being admitted:)

"The letter to the secretary of the Treasury;

"The letter of June 19th, 1841;

"The letter of September 21st, 1841;

by showing, from the said papers, that the said defendants had referred to and re-asserted the truth of the charges contained in the said libel charged in the declaration; and that such reference and re-assertion was not privileged, and was a publication of the libel, for which said defendants were responsible in this action.

"And in the case against Henry Addison, the plaintiff, for a like purpose, and to prove in the same way such a publication of the libel charged in the declaration as he was responsible for in this action, offered in evidence a paper, admitted to be in the handwriting of said defendant, Henry Addison, viz.: the letter of September 23d, 1841.

"And the defendants, by their counsel, objected to the admissibility of said papers so offered in evidence.

"And the court sustained the said objection, and refused to allow the said paper to be given in evidence; to which opinion and refusal the plaintiff, by his counsel, excepts, and prays the court to sign and seal this bill of exceptions; which is done accordingly, this 5th day of January, 1843, as witness our hands and seals.

"W. CRANCH, [SEAL.]
"JAS. S. MORSELL. [SEAL.]"

To review the decision of the court on these several points of law the present writ of error was brought.

May and *R. Brent*, for the plaintiff in error.
Bradley and *Coxe*, for the defendants in error.

May, for plaintiff in error.

What is the law applicable to the facts exhibited in this record?

It will hardly be denied that, in ordinary cases, the writing here declared on would, in view of its terms and tendency, be considered a libel, and the defendants to have acted maliciously, that is, with the view to effect those consequences, to which the means they have used naturally and obviously lead. 2 Starkie's Ev. 361.

But it will be contended that this is distinguished from the ordinary cases of libel, by reason of the occasion of writing and publishing it; it purporting to be a complaint about an official grievance, and being addressed to the President of the United States, the proper authority to redress it; that this is what is termed "a privileged communication."

That there is such a description of libels, well classified by stable legal distinctions, is admitted. They are founded upon considerations of public policy and convenience, and do confer upon their authors and publishers certain privileges.

Now what is the nature of a privileged communication, and what are its legal incidents?

It may be defined to be a writing published *bona fide* about a lawful occasion.

This lawful occasion may be found in the performance of a public or private duty of a legal or moral nature—of the fair and honest fulfilment of such obligations as spring out of the social relations of life; as in the exhibition of articles of the peace before a civil magistrate, or other communication in the way of a judicial proceeding; a petition about a public nuisance, or remonstrance presented by citizens to the proper authorities; an account of the character of a servant, made by a master; a report on the character of an intended husband, given by a brother to a sister, &c.

But these privileged libels are separated into two classes.

The first are all such communications as are presented in the course of justice, and before a tribunal having power to examine into their truth or falsehood.

The second class are all such as do not arise in the course of justice, and before a tribunal, &c.

Now, it is said to be the incident of the first class, that the occasion is an absolute bar to an action, even though the libel be false and malicious.

The incidents of the second class are, that the law only raises a *prima facie* presumption in favour of the occasion, which operates in the nature of evidence, and supplies a *prima facie* justification; and also that, under the general issue plea, the motives of the defendant, and the truth of the libel, may be given in evidence to the jury.

But there must be the concurrence of an upright intention along with the lawful occasion. It must not be an officious intermeddling with the rights of others, nor published through hatred and ill-will. It is the first requisite of this class of "privileged communications," that there be no taint of personal malice about it.

A writing thus justified by the occasion and good motives of its authors, bestows upon them an irresponsibility to legal condemnation, even though it produce injury to the rights of others.

This doctrine is founded not only upon considerations of public convenience, but also on a confidence in human motives, where they are upright and pure.

The law preferring to suffer the contingencies of occasional injury that may happen to individuals, rather than by shutting the door to the freedom of inquiry and complaint upon the administration of public affairs, the proceedings of courts of justice, or the performance of moral duties, where done fairly and truthfully, and the well-being of society should be prejudiced. Besides, the party accused in such cases is not without redress. If he be assailed unjustifiably in a judicial proceeding in a court, its dignity is offended and its censures secured; besides, the benefit of evidence to vindicate himself and disprove such charges is afforded. The true criterion of the privilege in the first class, (which creates a bar to an action,) is to be found in the power of the tribunal to afford this redress. If the libel be published before those who cannot afford this summary redress, then the occasion does not bar an action, and the libel belongs to the second class of privileged communications; and in all these, if the libel be malicious in fact, the privilege is gone, and the pretext of the occasion only serves to aggravate the wrong.

But the law in favour of these occasions will not (as in ordinary libels) imply malice, but it must be proved. And this is the great distinction.

There are two kinds of malice, as Justice Bayley distinguishes in 4 Barn. & Cress. 255; malice in law, and malice in fact. The first is inferred, the last must be proved. The first is a legal inference from all ordinary libels. The last is a legal requisite to maintain an action upon a privileged libel; and when malice in fact can be proved, the privilege that surrounded the libel, and in legal contemplation purified it, is stripped off, and the exposed libeller stands on the same level with the rest of his kind.

Lord Mansfield said, in Buller's N. P. 8, "Malice is the gist of the action, which is not implied from the occasion, but must be directly proved."

And to sustain this summary of the general doctrine, are the following authorities:

English. 4 Reports, 14; 2 Smith, 3; 1 Barn. & Ald. 239; 5 Barn. & Ald. 648; 8 Barn. & Cress. 578; 1 Moody & Rob. 198; 2 Bingham's New Cases, 464; 1 Saund. 131; 2 Burrows, 808.

American cases and authorities. 2 Kent's Com. 22. In Massachusetts, 3 Pick. 383; 4 Mass. 168; 9 Mass. 264. New York, 5 Johns. 34; 5 Johns. 524; 4 Wendell, 135. Pennsylvania, 2 Serg. & Rawle, 22; 4 Serg. & Rawle, 423. Maryland, 5 Harr. & Johns. 459.

Now the case at bar must belong to the second class of privileged communications, if indeed it be privileged at all. The President could not afford any redress to the plaintiff. He has no power to compel the attendance of witnesses, or to administer an oath. He could not inquire in a judicial way into the truth or falsehood of the charges. The plaintiff then turned to the Circuit Court for redress, and brought his action on the case. But that court refused, as the exceptions show, to allow him to read the libel to the jury, and to prove it "false and without probable cause," and that the defendants were actuated by malice in fact, or "express malice." But falsehood and want of probable cause are in themselves evidence of malice in fact. 1 Moody & Rob. 470; 4 Bingham, 408; 4 Serg. & Rawle, 423; 5 Harr. & Johns. 458.

But the privilege of this libel is very questionable. It prefers charges not relating in any wise to the plaintiff's official character. It alleges political offences committed before his appointment to office. It shows a personal aspiration after the office held by plaintiff. It is couched in terms of great asperity, and breathes throughout a spirit wholly incompatible with the honest purpose of redressing a public grievance. The privilege is doubtful upon the face of the libel, and whether privileged or not was a question for the jury. 9 Barn. and Cress. 406; 2 Bingham, 408.

The fifth exception shows a reiteration of the libel by the defendant Addison, after the plaintiff was removed from office. Then there was no privilege, and such repetition is a republication. 3 Stephens' N. P. 2564, and cases there cited.

I have now explored this record. Questions of the gravest consequences are presented by it. They may well claim to be decided by this the highest court in our land. The doctrine of "privileged communications" is here to be settled. There is seeming contrariety of judicial opinion on the subject in our country. The cases in 1 Saunders, in 5 Johnson, and in 2 Tyler, were approved by the court below as establishing the irresponsibility of these defendants, and will be relied on here to sustain that position.

Under the free dispensations of our Constitution and laws, where the greatest liberty of speech and of publication is allowed, and where this liberty, under the heat of political passions, is ever tending towards licentiousness, in assaults upon political adversaries who may be enjoying in office the fruits of party success, the questions here presented become most interesting, and the decision that your honours may pass upon them will ascertain the value of that great right, to this description of citizens, "of being secure in their good reputation."

Bradley, for defendants.

If this action should be maintained, there will be no end to actions for libels. The defendants were dissatisfied with a public officer,

and complained of what they thought a grievance to the officer who could redress it. If this course was not absolutely privileged, yet it was so much so as to compel the plaintiff to show that the acts were done without probable cause and with malice, and to charge it so in his declaration. Buller's N. P., as cited, says that malice and falsehood are the gist of the action, but publication is also necessary. The case in 7 Term R. 110, 111, shows that the occasion there justified the publication; and this is always a question for the court. In 1 Barn. and Ald. 339, the jury determined whether or not the words were used, but the question of occasion was reserved for the court. In 12 Wendell, 410, 546, all the American authorities are summed up. The great difficulty is to know how far the question of privilege goes. In this case the court below thought that the letters were addressed to such officers as were competent to remedy the grievance. In 1 Term R. 130, the defendant pleaded precisely what has been shown in this case. In 2 Tyler's (Vermont) Rep. 129, 133, it was held that where the occasion made a petition to the legislature necessary, no action would lie. If in this case the defendants had published the letter to the President, no privilege could have been pleaded. Kent's Com. 22.

In 2 Serg. & Rawle, 23, the libel was read to the jury without objection; but here we object that the plaintiff himself shows it to be a case of privilege.

In 4 Serg. & Rawle, 424, it was ruled that where malice and want of probable cause were relied upon to take away the ground of privilege, they must be averred in the declaration. So also 1 Wilson, 242; 2 Wilson, 304. All the exceptions in this case depend upon the first, for if the libel cannot be read the other papers cannot.

Coxe, on same side.

What are the points in the case? (Mr. *Coxe* here examined the several counts in the declaration.) The result of the whole is, that a person belonging to one party charges some of the other party with being guilty of a crime to effect his removal from office. The communication charged as libellous, was addressed to the President, and is not averred to have been ever published. That officer was vested with the whole control of the subject. The paper was sent to the secretary of the Treasury, from whom an agent of the plaintiff obtained it. There was no proof of publication whatever. Some of the exceptions relate to mere matters of aggravation, which were not admissible in evidence unless a ground of action was laid. Publication is essential; and it must be proved before the libel can be given in evidence. Starkie Ev. 351. The defendants are charged, it is true, with having shown the paper to citizens of Georgetown; but they had a right to show it for the purpose of obtaining signatures. 1 Wendell, 547.

Was it a publication to send it to the President? It was not sent for the purpose of injuring the plaintiff's character, but solely for the purpose of obtaining his removal from office. It was a perfectly constitutional proceeding; if not, Congress should pass an act to burn all the letters in the Departments. The President had full and exclusive jurisdiction over the subject, and was the sole judge of the propriety of the removal of the plaintiff. His reasons cannot be inquired into by the judiciary. 13 Peters, 255.

It is a well established principle, that when an action is brought for an act which is in itself lawful, those matters, beyond the act, which make it criminal, must be averred in the declaration. For example, in an action for keeping a mischievous dog: it must be averred that the dog was addicted to biting, and that the defendant knew it to be so. In this case the defendants had a right to address the President, and it must be averred that there was express malice, and also a want of probable cause. If the paper had been printed and handed about, it would have given a different aspect to the affair. In Stockdale's case, he was not responsible as long as the paper was confined to parliament. Generally, sending it to a third party is a publication, but not in all cases; such as sending information about a servant, &c.

It is said that the President could not have taken testimony about the matter. Suppose it to be so, and that his functions are imperfect, still his jurisdiction over the subject-matter and power to act according to his judgment cannot be denied.

Evidence of malice cannot be given under this declaration. There should have been a special action on the case.

R. J. Brent, for plaintiff, in conclusion.

This declaration is in the usual form, if the paper is an ordinary libel; but not, if the paper is one which the party was privileged to send. On the face of the paper it is clear, that the removal of the plaintiff was not asked for upon public grounds, because the acts complained of took place before his appointment to office. He is not charged with unfitness for office, but held up to odium as a private individual. There was a personal motive in all this. Addison was to be appointed in his place. The motive is an important consideration. 2 Bingh. New Cases, 463.

The paper is actionable on its face, as it charges the plaintiff with things which are calculated to bring public odium upon him: such as "descending to the lowest means," &c.

The declaration avers special damage. 1 Chitty's Pl. 291, ed. 1829; 3 Johns. Ca. 198.

It has been said that the declaration is insufficient, because it does not aver express malice. But it charges, that the acts were done "falsely and maliciously." Is not this enough? It does not

aver, that the libel was published "in presence of divers citizens," but it says, that it was "published," which is the usual form.

In 2 Bingham's New Cases, 273, the declaration was the same as in the present case.

In all the cases cited, the libel was read to the jury, but in the court below it was shut out.

As to the question of pleading, see 4 Wend. 136; 2 Burr. 812; 4 Bos. & Pul. 48. In the last case the action was for defaming a candidate for Parliament. The averment in the declaration was the same as in this case, and the plaintiff recovered.

As to what is a sufficient averment, see Holt on Libels, 256; 2 Smith, 43.

Mr. Justice DANIEL delivered the opinion of the court.

In the investigation of these cases it is deemed unnecessary to examine *seriatim* the five bills of exceptions sealed by the Circuit Court, and made parts of the record in each of them. The papers declared upon as libellous, and the instructions asked of the Circuit Court, are literally the same in both actions; the reasons, too, which influenced the decision of the court pervade the whole of these instructions, and are prese ited upon their face.

Before proceeding more particularly to consider the rulings of the court upon these instructions, it may be proper to animadvert upon a point of pleading which was incidentally raised in the argument for the defendants in error; which point was this: that, assuming the publication declared on as a libel to be one which would be *prima facie* privileged, the circumstances which would render it illegal, in other words, the malice which prompted it, must be expressly averred. Upon this point the court will observe, in the first place, that in cases like the one supposed in argument, they hold, that in describing the act complained of the word "maliciously" is not indispensable to characterize it; they think that the law is satisfied with words of equivalent power and import: thus, for instance, the word "falsely" has been held to be sufficiently expressive of a malicious intent, as will be seen in the authorities cited 2 Saund. 242 a, (note 2.) But the declaration in each of these cases charges the defendants, in terms, with maliciously and wickedly intending to injure the plaintiff in his character, and thereby to effect his removal from office, and the appointment of one of the defendants in his stead; and with that view, with having falsely, wickedly, and maliciously composed and published, and having caused to be composed and published, a false, malicious, and defamatory libel concerning the plaintiff, both as a citizen and an officer. The averments in these declarations appear to the court, in point of fact, to be full up to the requirement insisted on, and to leave no room for the criticism attempted with respect to them. But the defence set up for the defendants in error reaches much farther and to results infinitely higher

than any thing dependent upon a mere criticism upon forms of pleading. It involves this issue, so important to society, viz.: How far, under an alleged right to examine into the fitness and qualifications of men who are either in office or are applicants for office—or, how far, under the obligation of a supposed duty to arraign such men either at the bar of their immediate superiors or that of public opinion, their reputation, their acts, their motives or feelings may be assailed with impunity—how far that law, designed for the protection of all, has placed a certain class of citizens without the pale of its protection? The necessity for an exclusion like this, it will be admitted by all, must indeed be very strong to justify it: it will never be recognised for trivial reasons, much less upon those that may be simulated or unworthy. If we look to the position of men in common life, we see the law drawing providently around them every security for their safety and their peace. It not only forbids the imputation to an individual of acts which are criminal and would subject him to penal infliction; but, regarding man as a sympathetic and social creature, it will sometimes take cognisance of injuries affecting him exclusively in that character. It will accordingly give a claim to redress to him who shall be charged with what is calculated to exclude him from social intercourse; as, for instance, with being the subject of an infectious, loathsome, and incurable disease. The principle of the law always implying injury, wherever the object or effect is the exposure of the accused to criminal punishment or to degradation in society. These guardian provisions of the law, designed, as we have said, for the security and peace of persons in the ordinary walks of private life, appear in some respects to be extended still farther in relation to persons invested with official trusts. Thus it is said that words not otherwise actionable, may form the basis of an action when spoken of a party in respect of his office, profession, or business: Ayston *v.* Blagrave, Strange, 617, and 2 Ld. Raym. 1369. Again, in Lumby *v.* Allday, 1 Crompt. & Jarv. 301, where words are spoken of a person in an office of profit, which have a natural tendency to occasion the loss of such office, or which impute misconduct in it, they are actionable. And this principle embraces all temporal offices of profit or trust, without limitation: 1 Starkie on Slander, 124.

With regard to that species of defamation which is effected by writing or printing, or by pictures and signs, and which is technically denominated *libel*, although in general the rules applicable to it are the same which apply to verbal slander, yet in other respects it is treated with a sterner rigour than the latter; because it must have been effected with coolness and deliberation, and must be more permanent and extensive in its operation than words, which are frequently the offspring of sudden gusts of passion, and soon may be buried in oblivion: Rex *v.* Beau, 1 Ld. Raym. 414. It follows, therefore, that actions may be maintained for defamatory words pub-

lished in writing or in print, which would not have been actionable if spoken. Thus, to publish of a man in writing, that he had the itch and smelt of brimstone, has been held to be a libel. *Per* Wilmot, C. J., in Villers *v.* Mousley, 2 Wils. 403. In Cropp *v.* Hilney, 3 Salk., Holt, C. J., thus lays down the law: "That scandalous matter is not necessary to make a libel; it is enough if the defendant induce a bad opinion to be had of the plaintiff, or make him contemptible or ridiculous." And Bayley, J., declares in McGregor *v.* Thwaites, 3 Barn. & Cres. 33, that "an action is maintainable for slander either written or printed, provided the tendency of it be to bring a man into hatred, contempt, or ridicule." To the same effect are the decisions in 6 Bingh. 409, The Archbishop of Tuam *v.* Robeson; and in 4 Taunt. 355, Thorley *v.* The Earl of Kerry. In every instance of slander, either verbal or written, malice is an essential ingredient: it must in either be expressly or substantially averred in the pleadings; and whenever thus substantially averred, and the language, either written or spoken, is proved as laid, the law will infer malice until the proof, in the event of denial, be overthrown, or the language itself be satisfactorily explained. The defence of the defendants in error, the defendants likewise in the Circuit Court, is rested upon grounds forming, it is said, an established exception to the rule in ordinary actions for libel; grounds on which the decision of the Circuit Court is defended in having excluded from the jury, under the declarations in these cases, the writings charged in them as libellous. These writings were offered as evidence of express malice in the defendants. The exception relied on belongs to a class which, in the elementary treatises, and in the decisions upon libel and slander, have been denominated privileged communications or publications. We will consider, in the first place, the peculiar character of such communications, and the extent of their influence upon words or writings as to which, apart from that character, the law will imply malice: Secondly, we will examine the burden or obligation imposed by the law upon the party complaining to remove presumptions which might seem to be justified by the occasion of such communications, and to develope their true nature. And lastly, we will compare the requirements of the law with the character of the publication before us, and with the proceedings of the Circuit Court in reference thereto. The exceptions found in the treatises and decisions before alluded to are such as the following: 1. Whenever the author and publisher of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal or moral; or in the prosecution of his own rights or interests. For example, words spoken in confidence and friendship, as a caution; or a letter written confidentially to persons who employed A. as a solicitor, conveying charges injurious to his professional character in the management of certain concerns which they had intrusted to him, and in which the writer of the letter was also interested,

2. Any thing said or written by a master in giving the character of a servant who has been in his employment. 3. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used. 4. Publications duly made in the ordinary mode of parliamentary proceedings, as a petition printed and delivered to the members of a committee appointed by the House of Commons to hear and examine grievances.

But the term "exceptions," as applied to cases like those just enumerated, could never be interpreted to mean that there is a class of actors or transactions placed above the cognisance of the law, absolved from the commands of justice. It is difficult to conceive how, in society where rights and duties are relative and mutual, there can be tolerated those who are privileged to do injury *legibus soluti;* and still more difficult to imagine, how such a privilege could be instituted or tolerated upon the principles of social good. The privilege spoken of in the books should, in our opinion, be taken with strong and well-defined qualifications. It properly signifies this, and nothing more. That the excepted instances shall so far change the ordinary rule with respect to slanderous or libellous matter, as to remove the regular and usual presumption of malice, and to make it incumbent on the party complaining to show malice, either by the construction of the spoken or written matter, or by facts and circumstances connected with that matter, or with the situation of the parties, adequate to authorize the conclusion. Thus in the case of Cockayne *v.* Hodgkisson, 5 Car. & Pa. 543, we find it declared by Parke, Baron, "That every wilful and unauthorized publication injurious to the character of another is a libel; but where the writer is acting on any duty legal or moral, towards the person to whom he writes, or is bound by his situation to protect the interests of such person, that which he writes under such circumstances is a privileged communication, unless the writer be actuated by malice." So in Wright *v.* Woodgate, 2 Crompton, Meeson & Roscoe, 573, it is said, "a privileged communication means nothing more than that the occasion of making it rebuts the *prima facie* inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the onus of proving malice in fact; but not of proving it by extrinsic evidence only; he has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is evidence of malice on the face of it." In regard to the second example mentioned, viz., that of a master giving the character of a servant, although this is a privileged communication, it is said by Lord Mansfield in Weatherstone *v.* Hawkins, 1 T. R. 110, and by Parke, J., in Child *v.* Affleck, 9 Barn. & Cres. 406, that if express malice be shown, the master will not be excused. And the result of these authorities, with many others which bear upon this head is this, that if the conduct of the defendant entirely con-

sists of an answer to an inquiry, the absence of malice will be presumed, unless the plaintiff produces evidence of malice; but if a master unasked, and officiously, gives a bad character to a servant, or if his answer be attended with circumstances from which malice may be inferred, it will be a question for the jury to determine, whether he acted *bona fide* or with malice.

With respect to words used in a course of judicial proceeding, it has been ruled that they are protected by the occasion, and cannot form the foundation of an action of slander without proof of express malice; for it is said that it would be matter of public inconvenience, and would deter persons from preferring their complaints against offenders, if words spoken in the course of their giving or preferring their complaint should be deemed actionable; per Lord Eldon in Johnson *v.* Evans, 3 Esp. 32: and in the case of Hodgson *v.* Scarlett, 1 Barn. & Ald. 247, it is said by Holroyd, J., speaking of the words of counsel in the argument of a cause, "If they be fair comments upon the evidence, and relevant to the matter in issue, then unless malice be shown, the occasion justifies them. If, however, it be proved that they were not spoken *bona fide*, or express malice be shown, then they may be actionable." Abbot, J., in the same case remarks, "I am of opinion that no action can be maintained unless it can be shown that the counsel availed himself of his situation maliciously to utter words wholly unjustifiable." In relation to proceedings in courts of justice, it has been strongly questioned whether, under all circumstances, a publication of a full report of such proceedings will constitute a defence in an action for a libel. In the case of Curry *v.* Walter, 1 Bos. & Pul. 525, it was held that a true report of what passed in a court of justice was not actionable. The same was said by Lord Ellenborough in Rex *v.* Fisher, 2 Camp. 563; but this same judge in Rex *v.* Crevy, 1 M. & S. 273, and Bayley, J., in Rex *v.* Carlisle, dissented from this doctrine as laid down in Curry *v.* Walter, observing that it must be understood with very great limitations; and by Tindal, C. J., in the case of Delegal *v.* Highly, 3 Bing. N. C. 690, it is said "to be an established principle upon which the privilege of publishing the report of any judicial proceeding is admitted to rest, that such report must be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatsoever in addition to what forms strictly and properly the legal proceedings." So a publication of the result of the evidence is not privileged; the evidence itself must be published. Neither is a publication of a counsel's speech unaccompanied by the evidence. Lewis *v.* Walter, 4 Barn. & Ald. 605; Flint *v.* Pike, Ibid. 473.

Publications duly made in the ordinary course of parliamentary proceedings have been ruled to be privileged, and therefore not actionable. As where a false and scandalous libel was contained in

a petition which the defendant caused to be printed and delivered to the members of the committee appointed by the House of Commons to hear and examine grievances, it was held not to be actionable. Such appears to be the doctrine ruled in Lake *v.* King, 1 Saund. 163; and the reason there assigned for this doctrine is, that the libel was in the order and course of proceedings in the Parliament, which is a court. The above case does certainly put the example of a privileged communication more broadly than it has been done by other authorities, and it seems difficult, from its very comprehensive language, to avoid the conclusion, that there might be instances of privilege which could not be reached even by the clearest proof of express malice. The point, however, appearing to be ruled by that case, is so much in conflict with the current of authorities going to maintain the position that express malice cannot be shielded by any judicial forms, that the weight and number of these authorities should not, it is thought, be controlled and even destroyed by the influence of a single and seemingly anomalous decision. The decision of Lake *v.* King should rather yield to the concurring opinions of numerous and enlightened minds, resting as they do upon obvious principles of reason and justice. The exposition of the English law of libel given by Chancellor Kent in the second volume of his Commentaries, part 4th, p. 22, we regard as strictly coincident with reason as it is with the modern adjudications of the courts. That law is stated by Chancellor Kent, citing particularly the authority of Best, J., in the case of Fairman *v.* Ives, 5 Barn. & Ald. 642, to the following effect: "That petitions to the king, or to parliament, or to the secretary of war, for redress of any grievance, are privileged communications, and not actionable libels, provided the privilege is not abused. But if it appear that the communication was made maliciously, and without probable cause, the pretext under which it was made aggravates the case, and an action lies." It is the undoubted right we know of every citizen to institute criminal prosecutions, or to exhibit criminal charges before the courts of the country; and such prosecutions are as much the regular and appropriate modes of proceeding as the petition is the appropriate proceeding before parliament—yet it never was denied, that a prosecution with malice, and without probable cause, was just foundation of an action, though such prosecution was instituted in the appropriate court, and carried on with every formality known to the law. The parliament, it is said, is a court, and it is difficult to perceive how malicious and groundless prosecutions before it can be placed on a ground of greater impunity than they can occupy in another appropriate forum. The case of Lake *v.* King, therefore, interpreted by the known principles of the law of libel, would extend the privilege of the defendant no farther than to require as to him proof of actual malice. A different interpretation would establish, as to such a case, a rule that is perfectly anomalous, and

depending upon no reason which is applicable to other cases of privilege.

By able judges of our own country, the law of libel has been expounded in perfect concurrence with the doctrine given by Chancellor Kent. Thus, in the case of the Commonwealth *v.* Clap, 4 Mass. Rep. 169, it is said by Parsons, C. J., "that a man may apply by complaint to the legislature to remove an unworthy officer; and if the complaint be true, and made with honest intentions of giving information, and not maliciously, or with intent to defame, the complaint will not be a libel. And when any man shall consent to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office; and publications of the truth on this subject, with the honest intention of informing the people, are not a libel; for it would be unreasonable to conclude, that the publication of truths, which it is the interest of the people to know, should be an offence against their laws. For the same reason, the publication of falsehood and calumny against public officers, or candidates for public offices, is an offence dangerous to the people, and deserves punishment, because the people may be deceived, and reject their best citizens, to their great injury, and, it may be, to the loss of their liberties. The publication of a libel maliciously, and with intent to defame, whether it be true or not, is clearly an offence against law on sound principles, &c."

In the case of Bodwell *v.* Osgood, 3 Pick. Rep. 379, it was ruled, that a false complaint, made with express malice, or without probable cause, to a body having competent authority to redress the grievance complained of, may be the subject of an action for a libel, and the question of malice is to be determined by the jury. The court in this last case say, p. 384, "It may be admitted, that if the defendant had proceeded with honest intentions, believing the accusation to be true, although in fact it was not, he would be entitled to protection, and that the occasion of the publication would prevent the legal inference of malice." The court proceed further to remark, p. 385: "It has been argued that the jury should have been instructed, that the application to a tribunal competent to redress the supposed grievance was *prima facie* evidence that the defendant acted fairly, and that the burden of proof was on the plaintiff to remove the presumption. The judge was not requested thus to instruct the jury. He did, however, instruct them that the burden of proof was on the plaintiff to satisfy them that the libel was malicious, and that if the plaintiff did not prove the malice beyond any reasonable doubt, that doubt should be in favour of the defendant."

We have thus taken a view of the authorities which treat of the doctrines of slander and libel, and have considered those authorities

particularly with reference to the distinction they establish between ordinary instances of slander, written and unwritten, and those which have been styled privileged communications; the peculiar character of which is said to exempt them from inferences which the law has created with respect to those cases that do not partake of that character. Our examination, extended as it may seem to have been, has been called for by the importance of a subject most intimately connected with the rights and happiness of individuals, as it is with the quiet and good order of society. The investigation has conducted us to the following conclusions, which we propound as the law applicable thereto. 1. That every publication, either by writing, printing, or pictures, which charges upon or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous, or odious, or ridiculous, is *prima facie* a libel, and implies malice in the author and publisher towards the person concerning whom such publication is made. Proof of malice, therefore, in the cases just described, can never be required of the party complaining beyond the proof of the publication itself: justification, excuse, or extenuation, if either can be shown, must proceed from the defendant. 2. That the description of cases recognised as privileged communications, must be understood as exceptions to this rule, and as being founded upon some apparently recognised obligation or motive, legal, moral, or social, which may fairly be presumed to have led to the publication, and therefore *prima facie* relieves it from that just implication from which the general rule of the law is deduced. The rule of evidence, as to such cases, is accordingly so far changed as to impose it on the plaintiff to remove those presumptions flowing from the seeming obligations and situations of the parties, and to require of him to bring home to the defendant the existence of malice as the true motive of his conduct. Beyond this extent no presumption can be permitted to operate, much less be made to sanctify the indulgence of malice, however wicked, however express, under the protection of legal forms. We conclude then that malice may be proved, though alleged to have existed in the proceedings before a court, or legislative body, or any other tribunal or authority, although such court, legislative body, or other tribunal, may have been the appropriate authority for redressing the grievance represented to it; and that proof of express malice in any written publication, petition, or proceeding, addressed to such tribunal, will render that publication, petition, or proceeding, libellous in its character, and actionable, and will subject the author and publisher thereof to all the consequences of libel. And we think that in every case of a proceeding like those just enumerated, falsehood and the absence of probable cause will amount to proof of malice.

The next and the only remaining question necessary to be considered in these cases, is that which relates to the rulings of the

court below excluding the publication declared upon as a libel from going to the jury in connection with other evidence to establish the existence of malice. We forbear any remark upon the intrinsic character of the injury complained of, or upon the extent to which it may have been made out. These are matters not properly before us. But if the publication declared upon was to be regarded as an instance of privileged publications, malice was an indispensable characteristic which the plaintiff would have been bound to establish in relation to it. The jury, and the jury alone, were to determine whether this malice did or did not mark the publication. It would appear difficult *à priori* to imagine how it would be possible to appreciate a fact whilst that fact was kept entirely concealed and out of view. This question, however, need not at the present time be reasoned by the court; it has, by numerous adjudications, been placed beyond doubt or controversy. Indeed, in the very many cases that are applicable to this question, they almost without an exception concur in the rule, that the question of malice is to be submitted to the jury upon the face of the libel or publication itself. We refer for this position to Wright *v.* Woodgate, 2 Crompton, Mees. & Ros. 573; to Fairman *v.* Ives, 5 Barn. & Ald. 642; Robinson *v.* May, 2 Smith, 3; Flint *v.* Pike, 4 Barn. & Cres. 484, per Littledale, J.; Ib. 247, Bromage *v.* Prosser; Blake *v.* Pilford, 1 Mood. & Rob. 198; Parmeter *v.* Coupland, 6 Mees. & Welby, 105; Thomson *v.* Shackell, 1 Moo. & Mal. 187. Other cases might be adduced to the same point.

Upon the whole we consider the opinion of the Circuit Court, in the several instructions given by it in these cases, to be erroneous. We therefore adjudge that its decision be reversed; that these causes be remanded to the said court, and that a *venire facias de novo* be awarded to try them in conformity with the principles herein laid down.

EX PARTE, THE CITY BANK OF NEW ORLEANS IN THE MATTER OF WILLIAM CHRISTY, ASSIGNEE OF DANIEL T. WALDEN, A BANKRUPT.

This court has no revising power over the decrees of the District Court sitting in bankruptcy; nor is it authorized to issue a writ of prohibition to it in any case except where the District Court is proceeding as a court of admiralty and maritime jurisdiction.

The District Court, when sitting in bankruptcy, has jurisdiction over liens and mortgages existing upon the property of a bankrupt, so as to inquire into their validity and extent, and grant the same relief which the state courts might or ought to grant.

The control of the District Court over proceedings in the state courts upon such liens, is exercised, not over the state courts themselves, but upon the parties, through an injunction or other appropriate proceeding in equity.